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THE CREDIBILITY GAP: THE OBJECTIFICATION OF CHILD VICTIMS OF SEXUAL ABUSE 1880-1980

Kim Stevenson

Last March, the Solicitor General,¹ confirmed that the Crown Prosecution Service were prosecuting more defendants for child sexual abuse than ever before with sexual offences and domestic violence now accounting for 20% of all charging decisions. This is partly because of the ongoing complaints of historic abuse post-Savile but also the unprecedented revelations of systematic grooming and child sexual exploitation involving gangs preying on vulnerable teens. At the same time, Baroness Newlove, the Victims' Commissioner, published a critical review that child victims were still not receiving entitlements guaranteed in the Victims Code or Special Measures when testifying in court. She was 'disgusted to discover' that many victims were still not being taken seriously by criminal justice agencies, social workers, teachers, or society as a whole.² Just last month, Superintendent Tom Harding of West Mercia Police called the *Daily Mirror's* estimate of 1,000 sexually exploited girls in Telford 'sensationalised' reporting'.³

Back in 2011, Children's Minister Tim Loughton declared: 'Sexual exploitation has not been fully understood by the judiciary and the justice system...even if children do get over the huge hurdle and want to bring their abuser to justice, they then have to face a judicial process which sometimes treats them as though they were somehow complicit in their abuse.'⁴ Arguably, Loughton did not fully comprehend the legal position either as children have little agency in such decisions. Nevertheless, the omnipresent existence of such attitudes, a decade into the twenty-first century, underlines the extent to which the criminal justice system has failed to understand the implications and consequences of child sexual abuse. This is somewhat problematic given the conference title implies a sequential development from the trauma of the past to a more protectionist present. Reviewing the legal progress made in the twentieth century, which can only be fairly general in the time available, it is suggested that the evidence is less than compelling to convincingly map onto the positivity of the 'children's century' despite our optimistic belief to the contrary, partly

¹ Robert Buckland,

² *The Guardian* 22 February 2017

³ *Daily Mirror* 17 March 2018 prompting whistleblowing colleagues to reveal that applications for 20 Sexual Offence Prevention Orders had been withdrawn by the Force because they would 'involve too much work

⁴ Children's Minister, Tim Loughton, *The Guardian*, 17 May 2011, 23 November 2011)

because, as Delap concludes, culturally, 'There was no steady erosion of stigmatism or judgementalism.'⁵

The law has been complicit in reinforcing untenable cultural perceptions and slow to respond to the increasing consciousness of sexual abuse. Twentieth century law reports are peppered with ingenious defences and 'justificatory' pleas from those attempting to avoid liability. The inherent masculinity of the law dominated until virtually the end of the twentieth century. Women police officers were appointed in the Met from 1914 and more widely from c.1918, but it would take another 50 years for policewomen's departments to be established nationally. In 1937 there was no woman police officer in Plymouth as the Watch Committee refused to appoint one, in the 1950s there was just one female for the whole of Cornwall though by then there were 5 for Plymouth. Female jurors first appeared in 1920. Women could only become solicitors from 1919 so it was only in the last quartile that female lawyers and judges became more commonplace. Professional feminist involvement was irrationally and unjustifiably unrepresentative given that the vast majority of child victims were, and are, female. Stereotypically gendered 'misunderstandings' by the all male judiciary and legal counsel, often influenced by enduring Victorian rape myths, proliferated, as did the belief that children were not credible witnesses.⁶

A Century of Missed Opportunity?

The historiography of twentieth century child sex offending is still being written. Reviewing twentieth century responses exposes seismic interludes and shifts in how child sexual abuse was understood, defined and managed. For the first half, official sources and commentary are sparse though are now being supplemented by biography and oral testimony with an ESRC funded project.⁷ For the second, the ongoing disclosures of historic and institutional abuse accentuate significant gaps. The developing sciences⁸ including feminism and gender theory evolved more nuanced understandings about the nature and impact of sexual violation generally, enhancing public awareness, relocating sexual discourse into the public sphere and purging longstanding social taboos. But society was also forced to confront the

⁵ Lucy Delap, "Disgusting Details Which Are Best Forgotten": Disclosures of Child Sexual Abuse in Twentieth Century Britain

⁶ See K. Stevenson (2017) "'Children of a Very Tender Age have Vicious Propensities': Child Witness Testimonies in Cases of Sexual Abuse, *Law, Crime, History*;; K. Stevenson (2000) 'Unequivocal Victims: The Historical Mystification of the Female Complainant in Rape Cases', *Feminist Legal Studies*, 8, 346-66; J. Spencer and R. Flin (1993) *The Evidence of Children* (London: Blackstone Press)

⁷ See Delap.

⁸ Sexology, psychology, criminology, sociology, E. Olafson, D. Corwin and R. Summit (1993) 'Modern History of Child Sexual Abuse Awareness: Cycles of Discovery and Suppression', *Child Abuse and Neglect*, 17, 7-24 at pp. 8-10.

existence of sexual activities beyond its comprehension including the paedophiliac targeting and grooming of children, child pornography and female genital mutilation.

Twentieth century initiatives to *physically protect* children can be clearly tracked in the legislation starting with the Children Act 1908, Children and Young Persons Acts 1933 and 1969 and culminating in the overriding welfare of the child principle in the Children Act 1989. But arguably, there is no equivalent trajectory in relation to their protection from sexual abuse. Significant attempts were made to introduce legal reforms in the late nineteenth and early twentieth century by leading feminist campaigners. The Criminal Law Amendment Bills 1883-5,⁹ proposed raising the age of sexual consent from 13 to 16,¹⁰ generating ferocious debates in Parliament. Some peers believed men needed legal concessions to protect *them* from the 'immoral' advances of young girls. It was only W.T. Stead's exposure of the Maiden Tribute child trafficking scandal in the *Pall Mall Gazette* 6 July 1885 that convinced the House of Lords to immediately pass the Bills. The Criminal Law Amendment Act criminalised child prostitution and trafficking and increased the age of protection from 13 to 16, but it also provided a defence of reasonable belief that a girl was over 16 to mitigate the concerns raised in the Lords.¹¹ What we now refer to as the age of consent would be heavily contested for the next 40 years. (Nothing new parents sell virgins headline) Likewise, proposals to criminalize incest met similar opposition taking 20 years to secure the Punishment of Incest Act 1908.

The 1885 Act paved the way for social reformers to demand more protectionist legislation, from 1892 to 1921 over a dozen, mainly generic, Bills were introduced, but they repeatedly failed to gain consensus because of their conflicting aims. The Bills were a confused mix of *Liberal clauses* to protect young girls, *Repressive clauses* against prostitutes and *Medical clauses* prohibiting the transmission of venereal disease. Moral reformers believed they were acting in the best interests of young girls but their proposals were often counterproductive penalising young girls for 'seducing' adult men; or paradoxical - raising the age of consent to 19 while simultaneously reducing the sentence for rape from life to 10 years.¹² The age of

⁹ initiated by Josephine Butler's campaign on child trafficking

¹⁰ Until 1841 it was a capital offence to have sexual intercourse with a girl under 12 years, that being the age of marriage until the Age of Marriage Act 1929 increased it to 16. Section 50 OAPA 1861 criminalized carnal knowledge with a girl under 10 years, Section 4 OAPA 1875. increased to 13 in 1875, as a felony punishable with a maximum life sentence

¹¹ Section 4 CLAA 1885 carnal knowledge of a girl under 13 felony and section 5 made the carnal knowledge of girls aged between 13 and 16 a misdemeanour punishable with two years imprisonment, indecent assault also raised to 16.

¹² Prevention of Immorality Bill 1911 to raise the age of consent from 16 to 19 and make such carnal knowledge a felony while simultaneously reducing the life sentence for rape to 10 years (15 in aggravated circumstances).

consent was finally confirmed at 16 in the Criminal Law Amendment Act 1922 which appeared to adopt a protectionist approach removing an accused's defence of reasonable belief a girl was under 16. But a compromise amendment allowed the defence to be claimed if he was under the age of 23. This so-called young man's defence survived until 2003 but the fallacy of such dispensation is irrefutably underlined by the recent grooming gang cases where the majority convicted were aged between 18 and 23.

Mid-century, the Sexual Offences Act 1956 presented an opportunity to refine the law but it disappointed. The phenomenon of child sexual abuse was not yet universally acknowledged or understood, so there was no impetus to review the law. The Act mainly restated the existing nineteenth century provisions modernizing the language: carnal knowledge became unlawful sexual intercourse, but there was no equivalent protection for boys.¹³ Male rape was not legally recognised until 1995 so assaults on boys under 16 could only be prosecuted as a standard indecent assault, not a penetrative offence. There are some examples of men charged with indecent assaults on boys but few of female perpetrators. A rare one is Dulcie Mason, a married woman (age not given) indicted at Shropshire Assizes in 1968 and acquitted of nine counts of indecent assault committed on six boys aged 14 to 15 who visited her house singularly or in groups. Sometimes she suggested sexual intercourse, sometimes they did. Justice Veale was convinced that the boys were 'entirely willing parties': 'There was no threat, no gesture, no pulling of the boy, no reluctance on his part....I have no doubt that a woman who passively permits sexual intercourse at the suggestion of a boy of 15 is **not** assaulting the boy'.¹⁴ His comments reflect the legal presumption that at 14 boys were physically capable of sexual intercourse and so implicitly possessed the mental capacity to 'consent'. We now acknowledge that women can be as sexually abusive as men but this has only really entered the public consciousness post-2003 when it became possible to convict them as principals.

The limitations of the law, and those able to manipulate it, were partly acknowledged in the Indecency with Children Act 1960 – a very short Act and one that was largely ineffective. The statute created a single offence which applied to both boys and girls - inciting 'gross' indecency with a child under 14. 'Gross' was somewhat misleading referring to the age of the child not the *nature* of the assault and its derisory maximum sentence of 2 years or a fine of £100 was hardly a deterrent. It would take another half-century before Home Secretary, David Blunkett, officially confirmed that the law was 'archaic, incoherent and discriminatory',

¹³ proposed in 1913 but withdrawn due to limited support Criminal Law Amendment Bill, because of an accompanying clause to increase the age of consent for girls to 18

¹⁴ *R v Mason* (1968) 53 Cr App R 12 at 18.

and for the Sexual Offences Act 2003 to introduce, for the first time, a range of specific and gender neutral child sex offences.

Prosecutorial Problems

Prosecutions of child sexual abuse are significantly under-represented in the historical record for a range of reasons not least the censure of sexually explicit detail to assuage Victorian sensibilities. It was not only the limitations of the substantive law that made it difficult to hold abusers to account. Until the creation of the Director of Public Prosecutions in 1879 the state had no public responsibility to systematically enforce the criminal law.¹⁵ For non-familial abuse, a child's family would have to instigate and finance a private prosecution or secure sponsorship from a voluntary organization such as the Associated Societies for the Protection of Women and Children. For familial cases voluntary societies were often the only option but child victims were unlikely to have direct access.¹⁶ In 1887 the Home Office announced that private prosecutors could no longer recover any legal costs. Consequently, societies shifted the burden of prosecuting sexual offences onto the police.¹⁷ After initial disclosure, complainants would be expected to repeat their account to (male) police officers, surgeon, lawyers, magistrates at committal proceedings and the trial judge. They might also be required to confront the accused and state the charge in his presence. In 1900 at North Fulham Police Station, Jessie Quantrell, under 13, alleged she had been criminally assaulted by Benjamin Dent, a gentleman, who denied the offence. After a medical examination supported her account the police required her to state the charge in his direct physical presence.

The issue of *who* the law was supposed to protect kept resurfacing as illustrated in a notorious case from 1893. The Marylebone Police Court magistrate committed 18 year old Thomas Ford for indecently assaulting 13 year old Jane Tyrrell. But then committed her to the Central Criminal Court where she was convicted of unlawfully aiding and abetting Ford by 'agreeing' to have carnal knowledge implying she had 'seduced' him. The Lord Chief Justice (Coleridge) quashed her conviction confirming that Parliament could never have intended the 1885 Act to produce such a bizarre result. This is another example of how the

¹⁵ came into force 1 January 1880 – previous attempts criminal law commissioners in 1845 and two select committees on public prosecutions, 1854 to 1856,

¹⁶ The Treasury would cover the legal costs for rape prosecutions but this did not apply to young girls presumed to have in fact 'consented' ie acquiesced or submitted Section 50 Offences Against the Person Act 1861 criminalized carnal knowledge with a girl under 10 years. A child under 10 cannot give consent to any criminal intercourse...but she can give consent as to render the attempt no assault.'. Typically, these were charged as indecent assault or carnal knowledge outside marriage, until 1885 most complainants were under 12 - the age of marriage until 1929

¹⁷ *The Times* 17 July 1914 Statements were taken by male officers before the first Metropolitan policewomen were appointed to take depositions from women and children

masculine establishment has been complicit in manipulating the law to transfer responsibility onto the child, something that intensified in the twentieth century.¹⁸ It was only when the Crown Prosecution Service took over responsibility from the haphazard prosecution by local police forces 100 years later in 1985 [some had in-house legal prosecutors some did not] that there was the opportunity to introduce more consistent prosecutorial policies. However, it was not until 2013 that each CPS area was required to set up a dedicated specialist Rape and Sexual Offence unit; three years later a highly critical report noted it was 'a matter of regret' that each had adopted a completely different operating procedure for handling sexual offences.¹⁹

(In)Credible Children

Unsurprisingly children found themselves in an invidious position having taken the traumatic step of initial disclosure. In the courtroom, children were often regarded as neither reliable nor competent witnesses, hardly surprising as the law required them to give their evidence from absolute memory and, until 1987, in the direct physical presence of the accused. Child witnesses were expected to demonstrate uncompromising religious consciousness and sufficient understanding, as first espoused by the seventeenth century jurist Coke of the likely implications of 'burning in hell' if they lied.²⁰ As victims of sexual abuse, they were even less likely to be believed. The lead case of *Brasier* 1779 confirmed that infants under 7 could give sworn testimony on oath provided sufficiently mature to answer questions testing their understanding of piety.²² So crucial was religious belief that judges were prepared to postpone trials until the next Assizes for witnesses to undertake 'crash courses' in their God-fearing responsibilities.²³ Demeanour was critical, testimony was more likely to be credible if the child was pretty, intelligent, modest and demonstrated the requisite 'proprietary of manner.'

¹⁸ *R v Tyrrell* [1894] 1 QB 710

¹⁹ Thematic Review of the CPS Rape and Serious Sexual Assault units February 2016

²⁰ Sir Edward Coke, *First Institutes* (reprint Clarke et.al. 1832) 6b. Non-Christians were rejected not because of their incompetency as a witness, but because the weight of their evidence was regarded as inferior.

²¹ Saved or reborn - an 'experience' supposed to occur between 4 and 6 years of age when a child's pious sensibilities were thought to be first aroused.. As infant mortality was so high (around 25-30%), the child who had moved out of babyhood learned to walk and talk was no longer protected solely by baptism –any good adult wanted children to manifest signs of salvation as young as possible so their souls could go to heaven if they died... Edward Gorey's allegory about the dangers of dogmatism – fictional C19 Mrs Regera Dowdy anagram of his name The Pious Infant 1966

²² *R v Brasier* (1779) 1 Leach 199

²³ After all God would always know if a child told a lie: 'Thou god Sees't me' Any judge who failed to prevent a child unconsciously lying and so perjuring herself might be responsible for setting that child on a spiralling descent into delinquency In the 1860s the senior judiciary disapproved the practice causing cases to collapse where girls under 12 were unable to convince the court of their religious credentials and judges refused to allow them to give their testimony unsworn. *R v Cockburn* (1849) 3 Cox 543

NSPCC founder, Lord Shaftesbury, challenged the Government to override the judiciary and allow children to give unsworn evidence arguing that their innocence meant they should be more trusted than adults to tell the truth.²⁴ He secured a provision in the Criminal Law Amendment Act 1885²⁵ permitting girls under 13 to give unsworn evidence in cases of carnal knowledge but the infamous proviso was added that the accused could not be convicted as a matter of law unless her testimony was corroborated by other independent evidence implicating him.²⁶ This concession²⁷ backfired; child witnesses were generally made to give evidence on oath to avoid the corroboration requirement which was not removed until 1988.²⁸ Professor Glanville Williams is credited with being one of the first lawyers to address the issue of child witnesses but his views were highly conventional, he thought children unreliable witnesses - 'suggestible' 'egocentric', only 'slowly learn the duty of speaking the truth' and, echoing past and present tropes some 'little girls' were not only willing partners in vice' but 'might spite or blackmail to get innocent men in trouble'.²⁹

Children under 14 could give sworn evidence where they possessed sufficient intelligence and understood the duty to tell the truth but many judges still had their feet firmly planted in the spiritual expectations of the nineteenth century and sought to impose a minimum age bar. In the 1958 case of *Wallwork*, LCJ Goddard asserted it was most undesirable to call a 5 year old victim of incest and hoped it would not happen again indicating that 8 years should be the minimum age of competency to testify.³⁰ The Court of Appeal in *Hayes*, 1977 confirmed the watershed generally fell between 8 and 10 years.³¹ In 1988, Judge Willcock QC at Exeter Crown Court ordered the jury to acquit the defendant of indecent assault saying it would be a 'waste of time' to ask two girls aged 10 and 7 to hold the New testament and take the oath.³² He told the jury 'You may think this is a curious quirk of our law, but it is for good, logical and historical reasons. We are powerless to overcome it.' In 1989 Judge Joanne Bracewell acquitted a man of sexually abusing a 6 year old girl aged 7 at the time of

²⁴ Scottish law had allowed children to give unsworn evidence for years such as *R v Millar* 1870 where the defendant was convicted on the evidence of a girl aged 3 ½ years Cited in Spencer and Flin the evidence of Children 1st edn 48

²⁵ Section 4

²⁶ However, the amendment immediately increased the number of successful prosecutions 120 before Justice Hawkins at the Old Bailey in the first six months Ibid.

²⁷ section 38 reaffirmed in the Children and Young Persons Act 1933

²⁸ s34 Criminal Justice Act 1988

²⁹ G. Williams *The Proof of Guilt* p.132.

³⁰ *R v Wallwork* (1958) 42 Cr App R 152 and see McEwan evidence and the Adversarial process p.115

³¹ *R v Hayes* 1977 1 WLR 234 at para 237a-d

³² *The Times* 2 mar 1988

the trial stating she was 'troubled by the tender age of the witness.'³³ The Criminal Justice Act 1991 finally resolved such inconsistencies completely removing the requirement of sworn evidence and allowing all children under 14 to give unsworn evidence.³⁴

By the 1980s psychological research confirmed that children 'are much more reliable witnesses than previously thought.'³⁵ In 1987, Justice Pigot allowed three children aged 11, 10 and 8 to give their evidence from behind a screen for the first time. He produced a highly critical Report stating the 'Courts still prefer to rely on the accumulated wisdom of the past and have not absorbed or applied the fruits of modern research into child psychology.'³⁶ This was the first real step forward in recognizing the vulnerability of sexually abused children though it took another 10 years in the last breath of the millennium before the Youth Justice and Criminal Evidence Act 1999 approved the provision of special measures: screens, video links, removal of wigs, gowns and pre-recording of initial disclosure. And it would take another 20 years -2017 - before section 28 of the Act authorising the use of video-recorded cross-examination of child witnesses to avoid the need for physical presence at court and allow more immediate post-trauma therapy would be implemented.³⁷ As Newlove again highlighted this January, it has still not been universally implemented because of a shortage of experts.³⁸ The Ministry of Justice insist that children are only required to give evidence in court when absolutely necessary in the interests of justice, but this still accounts for some 40,000 child witnesses a year, many of whom will be severely damaged and further traumatized by the legal process. Any pretence of an age bar was finally dispensed with in 2010 when the LCJ rejected an appeal from Steven Barker, involved in the Baby P murder case, approving the trial judge's decision that the 4 ½ year old girl he had anally abused when she was 2, was competent to give evidence. He declared age is not determinative of a child's ability to give truthful and accurate evidence; C was a compelling and competent witness.³⁹ In October last year a 2 year old became the youngest ever to give evidence in a trial helping to secure a 10 year sentence for the accused.⁴⁰ Accepting the evidence of very

³³ The Times 10 May 1989

³⁴ S52 inserting s33A CJA 1988

³⁵ Spencer and Flin, the child witness: Ingenious or Ingenuous 286

³⁶ R v X Y Z [1990] 91 Cr App Reps 96

³⁷ Special Measures Directions under section 17 Youth Justice and Criminal Evidence Act 1999. See also Judge Pigot (1989) *Report of the Home Office Advisory Group on Video Recordings* (London: HMSO).Ministry of Justice Press Release, 'Greater protection for rape victims and children at risk of grooming', 19th March 2017. The common law further required that the judge give an additional corroboration warning for anyone alleging a sexual offence, child or adult; this was also removed in 1988.

³⁸ *The Guardian* 17 January 2018

³⁹ [R v B \[2010\] EWCA Crim 4 \(21 January 2010\)](#)

⁴⁰ <https://www.theguardian.com/law/2017/oct/10/two-year-old-girl-gives-evidence-in-uk-abuse-case>

young children is crucial in light of the NSPCC's findings that 1 in 7 victims are under 10 and over 1,000 were under 5 years.⁴¹

Conclusion

In the context of responding to child sexual abuse the twentieth century can hardly be described as the 'children's century' for those subjected to such violations. Historically, child victims have been poorly served by a legal system predisposed to treat children more as evidential objects than as vulnerable individuals deserving subjective consideration and safeguarding protection. The disclosures of HCSA post Savile have reaffirmed the impossibility of being believed and the inadequacies of the criminal justice system. The twentieth century was one that merely tinkered with the existing legal provisions rather than initiate wholesale reform. The intransigency of the law to consider alternative perspectives precipitated the introduction of radical practices and innovative techniques from child welfare professionals frustrated at the inability and unwillingness of the courts to deal with children in a more child appropriate manner. In the closing decades of the twentieth century this caused deep schisms in the working relationships of the police, social services and medical experts leading to disastrous consequences as exemplified by the scandals in Cleveland, Rochdale and Orkney.⁴² A legal framework is finally in place but it is society's cultural perspectives that are paramount in the shift from trauma to protection. As Hallett concludes, the more teen sexual activities become more 'normalised' especially within today's 'part consumer part responsible citizen culture, the less childlike the child is perceived and the less at risk or victim-like they seem to be.'⁴³

⁴¹ NSPCC Report: Child abuse and neglect in the UK (Radford)2011

⁴² In Cleveland a six week period in 1987 197 children were taken into care alleged to have been sexually abused – Rochdale 20 children from 6 families based on anonymous phone calls allegations of satanic abuse

⁴³ Sophie Hallett, Making Sense of Child Sexual Exploitation Polity Press 2017, University of Bristol, p.148